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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

In re C. B., a Person Coming Under the Juvenile
Court Law.

C086207

THE PEOPLE,

(Super. Ct. No. JV137216)

Plaintiff and Respondent,

v.

C. B.,

Defendant and Appellant.

Minor, C. B. challenges a judgment entered after the juvenile court, following a contested jurisdictional hearing, found that he had committed robbery and assault by means likely to produce great bodily injury, and found true that he had personally used a firearm in the robbery. The minor makes two related arguments, which he claims require reversal. First, he asserts the juvenile court committed misconduct when it secretly conducted an experiment on the minor's gun by manipulating the lighting in the judge's

chambers. Second, he argues the prosecution committed misconduct when it manipulated the minor's gun in a photograph admitted into evidence, which encouraged the juvenile court's illicit independent investigation. Finally, he argues given the passage of Senate Bill No. 620 (2017-2018 Reg. Sess.) amending Penal Code section 12022.53, remand is required in order to allow the juvenile court to exercise its sentencing discretion. The People concur remand is required for this limited purpose, but disagree with the minor's first two arguments.

We will remand to allow the juvenile court to exercise its sentencing discretion and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

We limit our recitation to that necessary to provide a general background and determination of defendant's issues on appeal.

The victim testified he was in the eleventh grade and was walking home from school while wearing Michael Jordan shoes. It was cloudy and starting to rain. He took his usual route, which took him through the parking lot of a large shopping center. In that lot, he saw a four-door, dark blue Infiniti sedan with no plates pulling out of a parking spot with two people in the front and three people in back. A person sitting in the rear passenger seat (which the victim identified in court as the minor), rolled down the window and asked the victim if he would sell his shoes. The victim was 15 to 20 feet from the minor and had a good view of him. The victim said no, and the minor said ok, and rolled up the window. The car took off, and the victim continued walking home.

After crossing the parking lot, the victim saw the same blue Infiniti parked about 30 feet away at the stop sign in his intended path, which scared him. The victim went to turn around and noticed the minor was walking about 15 feet behind him with one hand behind his back. The victim kept walking toward the blue Infiniti, and the minor sped up and asked him whether he wanted to buy some marijuana, and the victim said no. The minor was about a foot away when he pulled a gun out from behind his back and hit the

victim in the chest with it. The victim believed the gun was a metal semiautomatic with a “dark silver” top and a “lighter silver” grip. When asked to reconcile his descriptions of the gun as silver, but also that the muzzle of the gun was black, he explained, it was a “dark metal.”

The victim backed up and lifted his hands, dropping his umbrella, and the minor ordered the victim to “strip.” In response, the victim tossed the minor one of his shoes and was then hit over the head. He shut his eyes, fell to the ground, and was hit and kicked by multiple people. The victim opened his eyes in time to see people (including the minor) running to the blue Infiniti, which was still at the stop sign. They got in and drove away. His other shoe was gone.

The day of the robbery, the minor was dressed in a grey hoodie, with a black, “True Religion” beanie and a metallic grill. The victim identified the beanie in People’s exhibit four as being the same or similar to the beanie he saw the minor wearing. He thought the person who robbed him was about the same height as he: 5 feet 10 to 11 inches tall.

The victim did not have a phone. He finished walking home and told his father what had happened. Among his injuries, he had a knot on the back of his head.

The next day, the victim searched social media looking for his attacker and located a video post of the victim’s friend rapping with the minor standing in the background. He recognized the minor’s face, and the minor was wearing the same beanie. The victim continued digging and located the minor’s Instagram screen names and used one of those names within Facebook to identify the minor’s true name. He gathered screen shots from the minor’s Instagram and Facebook accounts, but did not initially tell anyone because he did not want himself or his family to get hurt. Ultimately, the victim shared screen shots with a school resource officer who followed up with him about the robbery. In one of those screen shots, the minor was wearing the same beanie and holding a semiautomatic handgun. The victim testified the handgun from the screen shot appeared to be the same

handgun from the robbery. The muzzle of the gun in the screen shot looked “black,” but also “metallic and metal.” The victim identified the beanie and gun offered at trial as being those the minor had on the day of the robbery. The gun was dark silver and had a shine on its side, visible in the light, and the lower part of the gun was brown.

Officer Nalee Moua testified to interviewing the victim the day of the robbery. The victim described his assailant as a skinny Asian male in his teens, 5 feet 10 inches tall with a silver grill who was wearing a “True Religion” beanie, black sweater, and light blue jeans. Officer Moua used her service weapon to aid the victim in describing the gun that had been used in the robbery, which he said was similar to the gun used; he pointed to what she interpreted as the slide and told her it was silver.

Detective Justin Johnson testified to participating in a search of the minor’s residence, where he collected from a bedroom, which also contained the minor’s mail, a “True Religion” beanie, as well as a semiautomatic handgun located in a shoebox on the floor of the closet. He described the gun as a green Glock with a nonshiny, matte black slide.

District attorney investigator Scott Waterman testified to taking a photo of the Glock recovered with a flash and after closing the blinds. Waterman did not clean the gun or otherwise do anything to alter the gun’s appearance. The picture was taken to see if they could recreate a picture that would look like the social media picture of the minor with the gun. Other photos under different conditions may have been taken, but they did not appear the same.

The minor moved four exhibits utilized when questioning witnesses into evidence, but otherwise did not present a defense.

The People argued, in pertinent part, that the handgun admitted into evidence was likely the gun used to rob the victim because the victim’s description of the gun used to rob him was consistent with the gun in evidence, especially in light of Waterman’s photograph of the gun in which the muzzle did not appear black.

In response, minor's counsel argued the minor had been misidentified by the victim, whose memory had morphed over time by exposure to social media. She argued that the victim's description shortly after the robbery could not be reconciled with his later identification of the minor's gun as the weapon used to rob him and urged the juvenile court to compare that description with the physical gun admitted into evidence. The minor's counsel also accused the district attorney of manipulating evidence by using unnatural lighting conditions not present at the robbery to make the gun appear silver.

In reply, the People argued the victim had credibly testified concerning the crime, and less than a month later, the beanie and gun had been recovered from the minor's bedroom, corroborating that the minor committed the crime.

DISCUSSION

I

The Juvenile Court's Jurisdictional Determination

The juvenile court took a 15-minute recess to consider the evidence in chambers. Pertinent to our review, the juvenile court thereafter noted it had reviewed the evidence, including "the firearm in natural light which is how my office is illuminating at this moment." The court went on to explain that "[w]hile the defense does raise a theoretical doubt, the Court has determined that that doubt is not a reasonable doubt as the gun, in the Court's assessment, does look different in different lights. Not interpreting it the way the defense interprets is that it's a black matte firearm. [¶] That is not how the Court sees the firearm, and I do think a reasonable witness description is as provided by the witness."

The juvenile court, giving "great weight to the very credible witness testimony" and identification made within 24 hours of the crime, sustained the allegations against the minor, including that he had used a firearm.

II

The Juvenile Court's Viewing Of The Gun In Natural Light

The minor argues the juvenile court committed misconduct when it secretly conducted an experiment on the gun in evidence by manipulating the lighting in the judge's chambers. The minor relies on subdivision (7) of the advisory committee commentary to California Code of Judicial Ethics, canon 3B(2), which states in pertinent part, "a judge shall not independently investigate facts in a proceeding and shall consider only the evidence presented or facts that may be properly judicially noticed." We discern no misconduct from the record before us.

In addition to this claim having been waived for failure to object below (*People v. Seumanu* (2015) 61 Cal.4th 1293, 1320), nothing in the record suggests that the juvenile court judge conducted a new investigation of evidence that went beyond the scope of evidence admitted at trial. Rather, the judge did exactly what the minor's counsel asked the judge to do in closing argument. The judge examined the gun in her chambers and compared what she saw to the victim's description of the gun outside, on a cloudy day. Like a jury, the judge was entitled to scrutinize the evidence and even "reexamine th[at] evidence in a slightly different context as long as that evaluation [wa]s within the 'scope and purview of the evidence.'" (*People v. Collins* (2010) 49 Cal.4th 175, 249 [jury may not conduct a new investigation going beyond evidence, but may scrutinize evidence and test reasonable inferences within scope of evidence received].)

Here, the judge considered the appearance of the gun in natural light and determined that the gun looked different in different lighting conditions, and thus, found the victim's description of the gun was reasonable. This was permissible factfinding, not misconduct. The minor's remaining authorities on this issue are inapposite. (See, e.g., *People v. Handcock* (1983) 145 Cal.App.3d Supp. 25 [judge abused discretion by taking pieces of a tail light to an auto dealer, obtaining a replacement lens, and then bringing the

parts-employee to court to testify]; *People v. Ramirez* (1952) 113 Cal.App.2d 842 [judge secretly conducted an experiment designed to test defendant's testimony and then ordered testing to follow up on that experiment].)

III

The Photographing Of The Gun

The minor argues the prosecution committed misconduct when it manipulated the seized gun in a photograph admitted into evidence to make the color look different, which encouraged the juvenile court to engage in an illicit independent investigation.

Like his previous argument, the minor failed to preserve this issue for appeal through a timely objection. (*People v. Hill* (1998) 17 Cal.4th 800, 820.) We also find it unpersuasive.

“A prosecutor’s conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process.” (*People v. Morales* (2001) 25 Cal.4th 34, 44.) “Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury.” (*Ibid.*) We find neither circumstance present here.

As noted above, the juvenile court’s examination of the gun in chambers was not an illicit independent investigation. Further, the photographing of the seized gun under different lighting conditions in an attempt to recreate the appearance of the gun, as seen in a social media post, is not *manipulating* evidence. The district attorney investigator who aided in taking these photographs did not clean or otherwise alter the gun prior to taking the photograph. Further, while a photograph taken of the seized gun with blinds drawn and a flash initially appears to be of limited probative value concerning the appearance of the gun wielded by the victim’s assailant, given that the robbery occurred

outside on a cloudy day when it was beginning to rain, that does not mean that the People committed prosecutorial misconduct by photographing that gun under different lighting conditions in an attempt to recreate the same appearance as in the minor's social media post holding what the People alleged was the same gun. In fact, whether the gun recovered was the same gun from the social media post was relevant because the victim testified the gun in the social media post appeared to be the same gun used to rob him. We discern no misconduct.

IV

The Firearm Enhancement

The minor argues remand is necessary so that the juvenile court may exercise the sentencing discretion authorized by the passage of Senate Bill No. 620. The People concur remand is required for this limited purpose.

On October 11, 2017, the Governor signed Senate Bill No. 620 (2017-2018 Reg. Sess.), which amended sections 12022.5 and 12022.53, effective January 1, 2018 (Stats. 2017, ch. 682, §§ 1-2), to permit a trial court to strike a firearm enhancement: “The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law.”

We agree with the parties that Senate Bill No. 620's amendment should be applied retroactively, and thus, remand is necessary to allow the juvenile court to exercise its newly authorized sentencing discretion. (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1089-1091 [amendment to Pen. Code, § 12022.53 applied retroactively].)

DISPOSITION

We remand to allow the juvenile court to exercise its sentencing discretion under Penal Code section 12022.53, subdivision (h) concerning whether to strike the firearm enhancement. The judgment is otherwise affirmed.

/s/
Robie, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Murray, J.